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No. 486

In the Supreme Court of the United States

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OCTOBER TERM, 1966

JOS. SCHLITZ BREWING COMPANY, *Appellant*

vs.

UNITED STATES OF AMERICA

and

GENERAL BREWING COMPANY

On Appeal from the United States District Court
For the Northern District of California
Southern Division

Objections of General Brewing Corporation to Motion to File Amici Curiae Brief

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INTRODUCTION

On September 22, 1966, General Brewing Corporation ("General Brewing") was served with a copy of a Motion for Leave to File a Brief as Amici Curiae and Brief of Amici Curiae. These documents were filed on behalf of two directors of General Brewing, Philip A. Ray ("Ray") and George Alef ("Alef"), and by a shareholder of Capital Estates, Inc., Lewis B. Reynolds ("Reynolds"), the latter individually and as self-styled representative of "all other

minority shareholders of Capital Estates". General Brewing objects to the motion for leave to file an amici curiae brief and requests that the Court enter an order denying the motion on the grounds that it does not satisfy the requirements set forth in the Rules of this Court and that it would serve no useful purpose in this appeal.

In support of its objections, and as a statement of its reasons for withholding its consent to the filing of the amici curiae brief, General Brewing informs the Court as follows:

BACKGROUND

This is a direct appeal from a final judgment of the District Court, entered March 24, 1966, finding that Jos. Schlitz Brewing Company's ("Schlitz") 1961 acquisition of the assets of Burgermeister Brewing Corporation and its 1964 purchase of 39.3 per cent of the outstanding common shares of John Labatt Limited ("Labatt"), which carried with it direct control of Labatt and indirect control of General Brewing, violated Section 7 of the Clayton Act, as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964). From the District Court's order directing Schlitz to divest itself of its interest in Burgermeister Brewing Corporation and its stock holding in Labatt, Schlitz has appealed. Notice of Appeal was filed on April 27, 1966, and on August 26, 1966, Schlitz filed its Jurisdictional Statement. On September 23, 1966, General Brewing filed a Motion to Affirm. On September 28, 1966, the United States of America filed a similar motion.

APPLICANTS ATTEMPT TO RAISE NEW MATTER NOT PRESENTED TO THE TRIAL COURT

Applicants' request for leave to file must be denied since their motion attempts to raise before this Court, matters which they concede (Motion, p. 2) were "not presented to the District Court".

On review of the judgment below, only the issues set forth in the Jurisdictional Statement may be considered by this Court. *Phillips Chem. Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 386, n. 12 (1960); *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 433, n. 12 (1963). Amici Curiae must take the case as so presented; they cannot for the first time on appeal raise matter that is irrelevant to the disposition of the issues framed by the Jurisdictional Statement. *R. C. Tway Coal Co. v. Glenn*, 12 F. Supp. 570, 587 (W.D. Ky. 1935); 3 C.J.S. § 3, p. 1052; 4 Am. Jur. 2d § 3, p. 111. See also, *Sutphen Estates, Inc. v. United States*, 342 U.S. 19, 23 (1951); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564, 567 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963).

Ray and another attorney for Mr. Paul Kalmanovitz were frequently present in court throughout the trial. At no time during the course of the trial did they or the other applicants request the trial court to allow them to participate in the trial or to voice their views on any aspect of the case. Ray, who is a lawyer (Brief, p. 4), and the other lawyer were content to sit by silently as spectators. Even if otherwise appropriate, the raising of new matter is certainly not permissible under these circumstances at this late stage in the proceedings.

The only purpose that applicants have in filing their Motion and in baring their personal grievances before this Court is to aid Schlitz in obtaining a reversal of the order of divestiture. They attempt to conceal their true purpose behind a camouflage of charges extraneous to this record. Thus, applicants complain that they have been injured as a result of alleged breaches of fiduciary duty; such allegations, even if they were true, "cannot prevail over *antitrust* requirements in this case." See *United States v. El Paso*

Natural Gas Co., 37 F.R.D. 330, 333 (D. Utah 1965). If applicants honestly believe that General Brewing has been guilty of any wrongdoing, and if they can prove that there is merit to their position, California law affords them a right to recover any damages they may have suffered. *Efron v. Kalmanovitz*, 226 Cal. App. 2d 546 (1964); *Remillard Brick Co. v. Remillard-Dandini Co.*, 109 Cal. App. 2d 405 (1952).

This Court, however, should not be concerned with hypothetical and problematic contentions; it should be concerned only with the supposed issues raised by the Jurisdictional Statement of Schlitz. Those issues involve the application of the antitrust laws to a particular set of facts and there has been no showing that with respect to that application the interest of the public will be inadequately represented. See *United States v. General Elec. Co.*, 95 F. Supp. 165 (D.N.J. 1950).

ALL ISSUES HAVE BEEN ADEQUATELY PRESENTED BY THE PARTIES

Consent to the filing of an amici curiae brief was requested by applicants' counsel, but was refused by counsel for General Brewing. This Court's Rule 42(3) requires the motion for leave to file to "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties and the relevancy to the disposition of the case." Applicants have not satisfied this requirement. Although they do assert that questions exist that will not be presented by the parties, they admit that the only reason that they will not be so presented is that they were "not presented to the District Court." As stated above, such questions cannot be raised for the first time on appeal.

In any event, apart from the smokescreen applicants attempt to create by suggesting that they have been injured by the acts of the majority shareholder, their only point is that the divestiture order should be modified so as to require Labatt to sell off General Brewing. This is precisely the contention repeatedly advanced by Schlitz at trial and now in its appeal. No showing has been made that this contention has not been adequately presented by the parties. Applicants urge the identical result, adding only that in their opinion *they* would be benefited by a sale of General Brewing.

APPLICANTS HAVE FAILED TO DEMONSTRATE THAT THEY HAVE ANY INTEREST IN THESE PROCEEDINGS

Rule 42(3) also requires that the motion for leave to file shall state "the nature of the applicant's interest." Ray and Alef attempt to satisfy this requirement by characterizing themselves as "minority" directors of General Brewing. General Brewing is a California corporation, however, and under the laws of that State there is no such thing as "minority directors." Directors do not represent discrete bodies of shareholders; a corporation is not a federation of groups of shareholders each sending its own representative to the board of directors to advance its special interests. A general fiduciary duty is imposed upon all directors to use their powers in good faith and for the common benefit and advantage of each and every shareholder. *Lawrence v. I. N. Parlier Estate Co.,* 15 Cal. 2d 220, 229-30 (1940); *Wickersham v. Crittenden,* 93 Cal. 17, 29 (1892); *Schwab v. Schwab-Wilson Machine Corp., Ltd.,* 13 Cal. App. 2d 1, 3 (1936).

Accordingly, it has long been the rule in California that the power and authority to manage the affairs of a Corporation are vested in the directors collectively as a board, not as individuals. *Thomasson v. Grace Methodist Episcopal*

Church, 113 Cal. 558 (1896). No decision or act "made or done by any member of the directors while not duly assembled as a board is a valid corporation act." *Smith v. Dorn*, 96 Cal. 73, 82-3 (1892). Thus, it is manifest from the face of the motion that since the board of directors of General Brewing did not authorize the filing of this Motion, Ray and Alef cannot pass themselves off as representing the corporation; indeed, the board of directors of General Brewing at a special meeting called by Ray and Alef and held on September 14, 1966, rejected the very position applicants now present to the Court, and by resolutions duly adopted, declared that such a position was detrimental to the best interests of the corporation. Finally, since neither Ray nor Alef are shareholders of the corporation, they cannot assume the role of spokesmen for the shareholders. Under no theory, therefore, can they demonstrate that they have a valid interest in the proceedings before this Court.

Reynolds claims an interest in the case by virtue of his stock holdings in Capital Estates. The record owner of 1200 shares of Capital Estates' common stock, he holds approximately .00104 of the outstanding shares of that corporation. He asks the Court for leave to file an amicus curiae brief so that he may demonstrate how a sale of General Brewing would benefit *him*. He has made no demand upon the board of directors of Capital Estates; to General Brewing's knowledge, he has not solicited support from any other shareholder of Capital Estates; he is not authorized to speak on behalf of anyone but himself.

But even Reynolds does not have an interest in this appeal. He is only a shareholder in a corporation which has made an investment in another corporation. Can it be said that he has an "interest" in the business affairs of such other corporation within the meaning of Rule 42? If the

investment by Capital Estates was wrongful, if it constituted a breach of fiduciary duty, Reynolds would have a cause of action for damages against Capital Estates. His remedy, however, is provided by State law, not by this Court in this proceeding.

IDENTITY OF APPLICANTS RAY AND ALEF

Ray and Alef, by their representations that they were elected to the board of directors of General Brewing "by over 300 shareholders (owning more than 30% of General's shares worth over $3,000,000 at current market value)," (Motion, p. 1) would have the Court infer that they are the chosen champions of a large, discontented minority of General Brewing's shareholders. In truth and in fact, they are no more than agents of the man whose personal interests they seek to advance by filing this Motion. What they conveniently fail to mention in their Motion is that included within these 300 shareholders is Paul Kalmanovitz, the sole owner of Maier Brewing Company, a substantial competitor of General Brewing in California. Mr. Kalmanovitz's holdings, acquired since this suit was filed and before trial, account for some 20% of the outstanding shares of General Brewing, that of the other 299 shareholders account for less than 10%.

Both Ray and Alef were first elected to the board of directors of General Brewing at the most recent shareholders' meeting. At that meeting, Alef received more than 99.5% of his votes from only one shareholder, Mr. Kalmanovitz. As the Brief states (p. 4), Alef is "administrative assistant" to Mr. Kalmanovitz. Ray, in the absence of opposition by management, had solicited and obtained some 300 proxies. He still needed 169,392 additional votes to get on the board. Mr. Kalmanovitz then caused 470,000 of his votes to be cast for

Mr. Ray, thereby placing Ray on the board of directors along with Alef. It is a patent distortion, therefore, for these two men to characterize themselves as representatives of or spokesmen for any substantial number of shareholders of General Brewing. They are simply agents of Kalmanovitz and Kalmanovitz owns Maier Brewing Company, a substantial competitor of General Brewing.

AN ADDITIONAL REASON FOR WITHHOLDING CONSENT

That the relief sought by Ray and Alef is identical to that desired by Schlitz is neither coincidental nor the result of an independent, disinterested evaluation of all the facts in this case. The identity is calculated, designed to give an apparent legitimacy to Schlitz's argument that the trial court should have directed a sale of General Brewing. This Court must be made aware of the true reasons for the positions of Schlitz and applicants Ray and Alef.

As noted earlier, both Schlitz and Maier Brewing Company ("Maier") are substantial competitors of General Brewing. Applicants agree with Schlitz that General Brewing should be sold, but not for the reasons set forth in their Motion. They are acting in behalf of their principal, Mr. Kalmanovitz, the sole owner of Maier. Kalmanovitz wants to see General Brewing disposed of at a forced sale for the simple reason that Maier, or Kalmanovitz, its owner, hopefully would be able to purchase control of General Brewing at the distressed prices that would result if such a sale were required. Thus, the aims of both Schlitz and Maier would be achieved: the divestiture of General Brewing by Labatt and the purchase of control of General Brewing by Maier.

Maier's purpose in this regard came to light recently with the discovery by General Brewing of a telegram sent by Mr.

Kalmanovitz to Jim Blyth, an officer of Schlitz, during the trial. This telegram pertained to the proposal advanced by Schlitz at the trial that it sell and dispose of the assets of General Brewing and thereby purportedly cure its violation of Section 7 of the Clayton Act. The following is an exact reproduction of the words and symbols as they appeared in the body of that telegram:

CHARGE TO THE ACCOUNT OF
MAIER BREWING COMPANY

TIME FILED
10:30 a.m.
SEPTEMBER 1, 1965

STRAIGHT WIRE

MR. JIM BLYTH
FAIRMONT HOTEL
SAN FRANCISCO, CALIF.

THE FOLLOWING TELEGRAM WAS SENT THIS MORNING TO ROBERT A. UIHLEIN, JR., PRESIDENT SCHLITZ BREWING COMPANY, MILWAUKEE, WITH COPY TO MR. UIHLEIN IN SAN FRANCISCO, IN CARE OF YOURSELF.

QUOTE) MY GROUP IS WILLING AND ABLE TO CONCLUDE OUR AGREEMENT—REACHED AFTER ABOUT EIGHT MONTHS OF DISCUSSIONS re GENERAL BREWING COMPANY—AND EXPECT YOU AND WILL HOLD YOU TO ALSO CONCLUDE THE SAME. I DESIGNATE MY ATTORNEY,—JAMES J. ARDITTO, 611 SUNSET BOULEVARD, LOS ANGELES, CALIFORNIA (626-5133)—AS THE PERSON YOU MAY CONTACT HERE IN LOS ANGELES FOR ANY FURTHER PRESENT DISCUSSIONS re THIS MATTER. I AM COPYING JIM BLYTH AT FAIRMONT HOTEL IN SAN FRANCISCO. (END QUOTE)

PAUL KALMANOVITZ

The purpose of the agreement referred to in the telegram and the purpose of applicants' Motion are identical: the elimination of General Brewing as a competitor of both Schlitz and Maier. Though the other reasons for doing so are clear and adequate, the knowledge of this communication between Schlitz and Maier is an added and compelling reason for General Brewing to deny consent to the filing of the amici curiae brief.

CONCLUSION

Schlitz's violation of the antitrust laws should not be allowed to be obscured by the intrusion of collateral disputes over questions irrelevant to the controlling requirements of the antitrust laws. Applicants do not contend, as they could not, that the Solicitor General and the other parties to this suit are inadequate to the antitrust task. The claim is that the United States Attorney and the Department of Justice and the other parties to this action will give precedence to the antitrust considerations and in the process neglect the "interest" that the applicants and their principal have in the outcome. But, in this case, only the antitrust considerations are properly before this Court. Compare *United States v. El Paso Natural Gas Co.*, 37 F.R.D. 330 (D. Utah 1965).

Insofar as the remedy adopted by the District Court is subject to review, the only question this Court need consider, once it finds that a violation of the antitrust laws has been proven, is whether the remedy is sufficient to protect the public interest. *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961). Applicants' contentions plainly are not relevant to this inquiry.

In short, there has been no showing that any relevant issue before this Court would be inadequately presented un-

less the applicants are allowed to participate in these proceedings. No useful purpose can be achieved by allowing another substantial competitor of General Brewing, Maier Brewing Company, simply to echo the views of Schlitz.

For these reasons and those set forth above, the applicants' Motion should be denied.

Dated: October 4, 1966.

Respectfully submitted,

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OPPOSITION OF JOS. SCHLITZ BREWING COMPANY TO MOTIONS TO AFFIRM

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October 19, 1966